

**2001 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR DEPUTY DISTRICT ATTORNEYS
ROUND 2**

The key statutes under which the DA can proceed -- Fish and Game Code § 5650 and Business and Professions Code § 17200 -- allow for, but do not require, the assessment of very large monetary civil penalties. In using their discretion in assessing penalties in environmental cases, courts apply several factors, which are often enumerated in the statutes themselves. Key among them are the extent of the company's deviation from the statutory or regulatory requirements, and the extent of the actual harm or the potential for harm from the violations. Other factors include the economic benefit to the company from its non-compliance, the willfulness of the company's actions, efforts by the company to comply with the legal requirements, the company's past history of compliance, its ability to pay a substantial penalty, the deterrent effect of the penalty on the company and others in the regulated community, and whether the regulatory agencies had historically acquiesced in the violations (i.e., they knew about the conduct but did nothing). In this case, the DA believes that he can establish that there was significant harm to public health and the environment, (although he acknowledges the artificial nature of the pond and the fact that the creek is located in an industrial area) and that the violations were clearcut and avoidable. The DA also recognizes that violations occurred for years without enforcement action by the regulatory authorities.

There has never been an environmental enforcement action of any significance in the county, so the DA does not know what monetary penalty to expect from a court, if liability is found. The DA wants to receive some money in penalties, but is willing to trade a significant amount of the monetary penalty to get restoration of the creek (in particular) and hopefully the pond as well. He also wants some additional money for damages (based on the natural resource damage theory), and would accept projects for resource enhancement for other parts of the creek upstream or downstream from the area directly impacted by the pollution (in addition to restoration of the harmed area of the creek). The DA knows that the natural resource damage analysis was done quickly and is something of an educated guess. Both parties know that, while a full-scale natural resource damage evaluation might produce a higher damage estimate, it could also be very costly to carry out. While LLI could be forced to pay the costs of the evaluation and the damages, the more complete assessment may not be justified by the ultimate result, so there is risk for both parties in that approach. The DA does not want to argue the specifics of the HEA analysis, except to say that the valuations are based on restoration costs for other projects in the area on other portions of the Pauls Creek and the cost of wetlands/pond projects. The DA is more comfortable with the estimates for costs of actual restoration of the pond and creek, but even these are estimates. This uncertainty may be a basis for some creative approaches to resolution of the case.

The DA requests that you consider very carefully an unusual aspect of this negotiation. Ordinarily, under Cal. Rules Professional Code, Rule 5-100, the DA cannot use the threat of criminal enforcement to obtain advantage in a civil case. Here, however, after the case was filed as a criminal matter, LLI requested discussion of civil compromise. The DA asks that you evaluate whether you can suggest in negotiations that LLI faces criminal jeopardy if the company fails to settle.

The DA would, if necessary, accept \$600,000 for penalties and damages (or project money), plus restoration of the creek (estimated at \$375,000). The DA would also like something for restoration of the pond-- perhaps an evaluation of the costs of restoration with an agreement to pay costs up to a certain amount. While the DA will, if necessary, accept a \$600,000 settlement for penalties and damage claims, plus restoration of the creek, the DA would consider it a disappointing result.